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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*

Chair-Rapporteur: Guillaume **Long**

* The annexes to the present report are circulated as received, in the language of submission only.

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I. Introduction

1. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014, and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights. In the resolution, the Council decided that the Chairperson-Rapporteur should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group, taking into consideration the discussions held at its first two sessions.[1]

2. The third session, which took place from 23 to 27 October 2017, opened with a video statement by the United Nations High Commissioner for Human Rights. He congratulated the former Chair-Rapporteur for successfully steering the first two sessions in a manner that laid fertile ground for the preparation of the elements and recognized that the treaty process had entered a new phase to discuss such elements. He noted that the Guiding Principles on Business and Human Rights were an important step towards extending the human rights framework to corporate actors. He stated that there was no inherent dichotomy between promoting the Guiding Principles and drafting new standards at the national, regional or international level aimed at protecting rights and enhancing accountability and remedy for victims of corporate-related human rights abuses. He reiterated his commitment and full support to the working group, and expressed his hope that the recommendations from the accountability and remedy project of the Office of the United Nations High Commissioner for Human Rights (OHCHR) could provide useful contributions to the discussion during the third session.

3. The High Commissioner's remarks were followed by a statement of the President of the Human Rights Council, who emphasized the role that human rights must have in relation to business in a globalized world. He noted that seeking consensus and engaging in constructive cooperation and dialogue was the spirit of the first two sessions and would be key to fulfilling the mandate provided by resolution 26/9. The President further recalled the close link between the 2030 Agenda for Sustainable Development and the development of human rights, which justified its use as a starting point to form the objectives of the working group process.

4. The Director of the Thematic Engagement, Special Procedures and Right to Development Division referred to the recommendations of the accountability and remedy project, aimed at enhancing the effectiveness of national judicial systems in ensuring accountability and access to remedy, including in cross-border cases, which could inform the working group process. She expressed the willingness of OHCHR to provide further substantial or technical advice to the working group as appropriate.

II. Organization of the session

A. Election of the Chair-Rapporteur

5. The working group elected Permanent Representative of Ecuador, Guillaume Long, as Chair-Rapporteur by acclamation following his nomination by the delegation of Jamaica on behalf of the Group of Latin American and Caribbean States.

[1] See A/HRC/31/50 and A/HRC/34/47.

B. Attendance

6. The list of participants and the list of panellists and moderators are contained in annexes I and II, respectively.

C. Documentation

7. The working group had before it the following documents:

(a) Human Rights Council resolution 26/9;

(b) The provisional agenda of the working group (A/HRC/WG.16/3/1);

(c) Other documents, notably a document setting out the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereinafter, "the elements document"), a programme of work, and contributions from States and other relevant stakeholders, which were made available to the working group through its website.[2]

D. Adoption of the agenda and programme of work

8. In his opening statement, the Chair-Rapporteur explained how the third session would involve substantive negotiations based on the elements document that was distributed in advance of the session. The elements set out in the document were based on deliberations during the first two sessions, as well as over 200 meetings held since 2014 involving multiple stakeholders. At the core of the elements was the protection of victims of business-related human rights abuse, the elimination of impunity and access to justice. He invited everyone to participate actively, including civil society, trade unions, national human rights institutions and victims organizations, as their role was crucial to the success of the process. He emphasized that future generations should have the right to live in a world in which human rights took primacy over capital.

9. The Chair-Rapporteur presented the draft programme of work and invited comments. A regional organization expressed its regret that consultations on the draft programme of work had not occurred until 18 October, providing little time for negotiations on such an important document. The delegation recalled that, despite the short notice, all attendees had worked hard to find a compromise and praised the Permanent Mission of Ecuador to the United Nations Office and other international organizations in Geneva. According to the regional organization, a compromise had been tentatively reached on 18 October, whereby there would be two additional elements included in the programme of work. First, a debate reflecting on the implementation of the Guiding Principles would be included at the start of the session. Second, a footnote that was included in the programme of work of the second session would be reproduced, stating "this programme of work does not limit the discussions of this intergovernmental working group, which can include transnational corporations, as well as all other business enterprises". While the delegation acknowledged that the first element of the compromise was mostly incorporated (albeit without panellists to lead the discussion), it was concerned that the footnote had been excluded. It stressed that that was not a procedural issue, but a substantive one with wide implications, as the inclusion of the footnote would ensure that the working group could also consider abuses involving activities related to national enterprises. Therefore, it requested an amendment to the programme of work to include the footnote.

[2] See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx.

10. Several delegations intervened to express their support for the programme of work as proposed by the Chair-Rapporteur and requested the flexibility of the regional organization to adopt it to start negotiations. Some other delegations supported the proposal of the regional organization and regretted the lack of consensus with regard to the programme of work.

11. The delegations that rejected the proposal stressed that the mandate in resolution 26/9 — limited to transnational corporations — was clear and that there was no need to advance substance or prejudge content to be discussed and negotiated. They considered that that would improperly attempt to amend a Council resolution. Other delegations saw the merit of including the footnote to broaden the scope of the discussions, in line with the programme of work adopted for the second session.

12. Another delegation did not agree that any compromise was reached at the 18 October meeting since many delegations had not been present and recalled that it was not just one State against the proposal to include a footnote in the programme of work. Additionally, that delegation found it peculiar that the same delegations voting against resolution 26/9 were now calling for an expansion of the mandate with the intention of blocking the session. Another delegation noted that the discussion was unreasonably delaying negotiations and was ultimately harming those they were trying to protect through that process.

13. The regional organization recalled that resolution 26/9, which they respected, restricted the scope and, therefore, prejudged the outcome of the negotiations and that the programme of work was a working modality to allow for an inclusive process. It found it puzzling that one could object to its proposal, as it sent a message to civil society, human rights defenders and victims that abuses by national enterprises should not be treated with equal rigor. Additionally, the delegation reaffirmed that that was a compromise proposal that nobody objected to during the consultations except for one State and that the footnote was part of the programme of work for the second session. It stated that that unfortunate situation raised serious questions as to whether any agreement on basic principles, let alone language, could be forged in the future.

14. The Chair-Rapporteur shared the view that a compromise had not been reached to amend the programme of work and pointed out that further discussion could take place during the panel devoted to the scope of the treaty. He suggested that the working group adopt the programme of work as presented and that all delegations' views be reflected in the report. As no delegation expressed objections to that proposal, the programme of work was adopted.

III. Opening statements

A. Keynote speeches

15. María Fernanda Espinosa Garcés, Minister of Foreign Affairs of Ecuador, and former Chair-Rapporteur of the working group, delivered a keynote statement that explained the background to the establishment of the working group. Discussions surrounding the regulation of transnational corporations at the international level dated back to the 1970s. Since then, globalization had brought great power to transnational corporations, leading to positive consequences for economic development, but also many negative social consequences. Non-binding, voluntary rules had been valuable but had been unable to ensure victims' access to remedy in cases of corporate human rights violations. The adoption of resolution 26/9 was a milestone, representing a paradigm shift in the efforts to address corporate abuse. The working group process, led by Ecuador and South Africa, to fill a gap in international law was supported by a wide range of stakeholders,

including a large number of civil society organizations. Serious companies supported it since they wanted a level playing field. She stressed the importance of prevention in the elements document, which could have been a key tool to avoid disasters like Rana Plaza, pollution in the Niger Delta and the destruction of lives in the Amazon by Chevron-Texaco. States supported it since they recognized that the two paths — one obligatory, the other voluntary — were mutually reinforcing, as demonstrated by the recent French duty of vigilance law and several other examples. Ms. Espinosa expressed her appreciation that hundreds of people had signed up to participate in the process and hoped that everyone would engage constructively and with respect for diverse viewpoints.

16. Dominique Potier, Member of the French National Assembly, highlighted the importance of ethics in guiding any discussion on human rights. Historically, attempts to fight slavery and provide labour protection were challenged as regulations leading to "the end of the world", but ended up being the dawn of a new era. Such efforts led to significant decreases in abuse. The recent French duty of vigilance law was a contemporary regulation that could serve as an inspiration for the working group. The law was based on United Nations principles, including the Guiding Principles; was process-oriented; focused on nationality rather than territory; and was progressive in that it targeted the largest companies so they could lead by example. That pragmatic approach made the French law acceptable for all, relevant and adequate to tackle human rights violations. It created a national framework that had an impact all over the world.

B. General statements

17. Delegations congratulated the Chair-Rapporteur on his election and thanked the former Chair-Rapporteur for successfully leading the first two sessions. Many delegations expressed appreciation for what they considered a transparent and inclusive process and reaffirmed their trust in the Chair delegation in overseeing the third session.

18. A delegation speaking on behalf of a regional group of countries reiterated its commitment to resolution 26/9 and stressed that transnational corporations could not operate in a legal void. According to that group, setting clear standards would provide a level playing field and predictability. For the group, the work undertaken during the sessions was complementary to the work on private military and security companies, environmentally sound management of hazardous wastes and illicit flows. Therefore, they stressed the need to regulate the operations of transnational corporations and other business enterprises in a uniform manner.

19. Many delegations voiced their support for establishing a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. While recognizing that business could and did have a positive impact on human rights, especially with respect to economic development, several delegations, including a regional group, and non-governmental organizations (NGOs) stated that companies had undermined human rights and contributed to adverse human rights impacts with impunity. Efforts to address that accountability gap had been ongoing for over 40 years with little success.

20. Delegations recognized that initiatives such as the Guiding Principles had been a large step forward, but found that soft law instruments and voluntary principles had not been enough; a mandatory regulatory framework was needed to ensure accountability and access to justice. Creating a legally binding instrument would be complementary to, and not in opposition to, the Guiding Principles. Legal lacunae in the Guiding Principles could be addressed with international obligations, and certain aspects of the Guiding Principles should be made mandatory.

21. A legally binding instrument would benefit victims of business-related human rights abuse by ensuring that companies were held accountable and that victims had access to prompt, effective and adequate remedies. Additionally, several delegations considered that such an instrument could be beneficial to business since it would create a level playing field. Uniform rules across jurisdictions would create legal certainty that business would appreciate.

22. Many delegations welcomed the elements document as being comprehensive, imposing obligations on transnational corporations and other business enterprises and contributing to victims' access to justice.

23. One regional organization noted that the Chair-Rapporteur had opted for an all-encompassing business and human rights negotiation, which, to their understanding, risked delaying progress. The delegation reserved their position on the document.

24. Several other delegations, as well as some business organizations, voiced concern about the elements document and regretted that it had been published three weeks before the session, allowing insufficient time to fully analyse and formulate official positions on the content.

25. One regional organization highlighted that the Guiding Principles recalled the existing obligations of States and that full implementation would probably react to the numerous cases documented by civil society and human rights defenders.

26. Some delegations thought that discussions on a legally binding instrument were premature. The Guiding Principles had been unanimously endorsed six years ago, and more time was needed to implement them. That process risked distracting attention away from such implementation. Other delegations agreed that primacy should be afforded to the Guiding Principles, but acknowledged that both the Guiding Principles and a legally binding instrument would have common objectives, and that a smart mix of voluntary and regulatory measures could be beneficial.

27. Many delegations agreed that States had the primary duty in protecting against human rights abuses by third parties, including business enterprises, and commended the elements document for reflecting that consensus. However, there was disagreement as to which business enterprises should be covered by a legally binding instrument. Several delegations expressed the view that national enterprises should be covered by the instrument, a view shared by many NGOs. Given the complex nature of corporate structures and the prevalence of nationally incorporated subsidiaries, those delegations feared that transnational corporations could find ways to fall outside the scope of an instrument regulating only transnational activities. While some delegations expressed the view that resolution 26/9 and the proposed elements permitted all business enterprises to be covered, other delegations rejected that as expanding the mandate in resolution 26/9 and noted that national laws already regulated national companies.

28. Delegations disagreed about the extent to which an instrument should permit the exercise of extraterritorial jurisdiction. One delegation suggested that the instrument could incorporate extraterritorial obligations as laid out in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, while another delegation rejected the idea that a legally binding instrument should permit States to exercise any form of extraterritorial jurisdiction.

29. Multiple delegations welcomed the fact that the elements document included provisions on international cooperation and capacity-building. The legally binding instrument should recognize the differing capacities of States and allow for assistance in order to ensure effective implementation of the treaty.

30. Some delegations and multiple NGOs insisted that the treaty ensure specific protections for certain vulnerable populations, such as indigenous peoples. Given the

disproportionate effect that human rights abuses had on women and girls, there was a call for a gendered approach to the treaty.

31. Some delegations and NGOs also discussed the need for the instrument to take account of conflict situations and provide special protection in cases of occupation and other types of armed conflict.

32. While several NGOs called for the instrument to clearly assert the primacy of human rights over trade and investment agreements, one delegation highlighted that there was no hierarchy among norms in international law, with the exception of *jus cogens* norms.

33. There was wide consensus among most delegations and civil society that, going forward, the process would benefit from a transparent, inclusive, and constructive dialogue involving multiple stakeholders. Some delegations and business organizations expressed concern that the business community had not been given sufficient opportunities to engage meaningfully in the current session.

C. Debate: reflections on the implementation of the Guiding Principles on Business and Human Rights and other relevant international, regional and national frameworks

34. One regional organization expressed its appreciation for including the current session in the programme of work. It recalled how in the last six years, there had been numerous positive initiatives aimed at implementing the Guiding Principles. Since the working group process could be expected to take some time to conclude, it was suggested that States and business should take further steps to implement the Guiding Principles at the time in order to prevent abuses and ensure protection for victims.

35. A number of delegations expressed their support for the Guiding Principles, as a unanimously endorsed authoritative global standard. Additionally, delegations discussed different initiatives implementing the Guiding Principles, in particular national action plans. Support was expressed for the accountability and remedy project, the Working Group on business and human rights, as well as the annual Forum on Business and Human Rights.

36. Some delegations noted that the Guiding Principles were not purely voluntary since they discussed the substantive obligations of States under international human rights law. Other delegations and one NGO did not agree that the Guiding Principles could guarantee the protection of human rights.

IV. Panel discussions

A. Panel I. General framework

37. The first panellist noted that the counterweight to the impunity of the transnational corporations was the product of a strong grass-roots process. Consumers needed access to information to influence business habits; thus, there should be transparent human rights due diligence processes throughout supply chains. She noted that the European Parliament had mandated its representative to maintain a constructive dialogue with the working group because it believed that there needed to be a legally binding instrument regulating business and human rights. The panellist invited the regional organization to engage constructively in accordance with the common position of the European Parliament with respect to that process.

38. The second panellist offered a development perspective to the discussion. He argued that globalization distinctly disadvantaged developing countries, and that large financial

corporations posed barriers to development in the global South and affected inequality within all nations. Furthermore, the predatory features of the current economy impeded the Sustainable Development Goals, but there was a growing trend to combat that.

39. The third panellist addressed the accelerating pace of challenges faced by the global community with respect to development and recognition of human rights. He found the proposed elements reflected the main perspectives expressed during the previous two sessions and highlighted three objectives in the document: (a) guaranteeing the respect, promotion and fulfilment of human rights, (b) guaranteeing access to remedies, and (c) strengthening international cooperation.

40. Some delegations argued that the chapter on the "General framework" in the elements document should be more concise, while others expressed appreciation for the comprehensive approach. To facilitate shortening the chapter, it was proposed merging the subsections on "principles", "purpose", and "objectives". Other delegations thought that only the subsections on "purpose" and "objectives" should be merged and questioned what the difference was between the two given the similar elements in both categories.

41. With respect to the "preamble", several delegations commented on the selection of instruments listed, with some arguing that there were too many instruments and others arguing that certain instruments were missing. One regional organization and some NGOs questioned why treaties were contained in the same list as non-binding instruments.

42. Some delegations suggested that there should be reference to the positive impact business could have on human rights, while other delegations suggested including a reference to the negative effects of transnational corporations in the context of globalization. Additionally, NGOs recommended that language should be included regarding corporate capture.

43. Several delegations appreciated the references made to the right to development and economic, social and cultural rights. Additionally, delegations and NGOs welcomed the reaffirmation of the Guiding Principles, showing that that process was complementary. However, one delegation found it inappropriate to include a reference to the Guiding Principles since they had not been developed and negotiated by States. One business organization questioned why there was a reference to the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, when that process was abandoned over a decade ago. The Chair-Rapporteur replied that many elements contained in those norms were cited approvingly in the first two sessions.

44. Much discussion focused on the subsection on "principles". Many delegations and NGOs welcomed the recognition of the primacy of human rights obligations over trade and investment agreements. However, one regional organization and other delegations questioned the legal basis for that and wondered how it would apply in law and practice. It was queried whether this would require the renegotiation of existing treaties, and whether that implied that States could disregard provisions of trade and investment treaties, citing human rights. One delegation asked how the primacy of human rights obligations would be considered, taking into account the report on fragmentation of international law of the International Law Commission.

45. Delegations questioned whether recognizing special protection of certain human rights signalled a hierarchy of certain human rights over others. One regional organization noted that that provision could potentially conflict with another provision discussing the universality, indivisibility, interdependence and interrelationship of all human rights. The Chair-Rapporteur clarified that the intention of the provision was not to create a hierarchy, but to note specific rights that were more likely to be affected by business activities.

46. Some delegations voiced concern over the language used to recognize the special protection of vulnerable groups. Acknowledging that certain groups required differentiated

treatment, it was feared that including a list of some groups could indicate the exclusion of others. Others requested that the language be altered to reflect a more positive, empowering tone.

47. One delegation noted that the reference to the duty of States to prepare human rights impact assessments was inappropriate in that section since that was not a "principle". The same delegation also expressed concern about the provision recognizing the responsibility of States for private acts since it believed it had been worded too generally and failed to recognize that such responsibility only arose in certain circumstances.

48. Several elements under the subsection on "purpose" also received attention. Some delegations approved a reference to the civil, administrative and criminal liability of business. One delegation did not agree since many States' legal systems did not criminally punish legal entities, and thought that States should have discretion as to how to enforce the treaty.

49. Delegations and NGOs welcomed the reaffirmation that States' human rights obligations extended beyond territorial borders, with some requesting that that be elaborated in the instrument. One regional organization questioned whether that provision conflicted with one in the preamble reaffirming the sovereign equality and territorial integrity of States, including in relation to progress in the area of the responsibility to protect. A business organization expressed concern about the inclusion of the term "promotion", saying that, while companies should respect human rights, they should not have an international obligation to "promote" human rights.

50. Regarding the objectives of the instrument, delegations welcomed the reference to international cooperation and mutual legal assistance, noting its importance for the effective implementation of the instrument.

B. Panel II. Scope of application

51. The first panellist noted that the elements document referred to the transnational activities of transnational corporations and other business enterprises, regardless of the mode of creation, control, ownership, size or structure. That indicated an inclusive approach in line with the Guiding Principles and rightly focused on activities rather than their corporate ownership. Additionally, she supported the scope of application to cover all internationally recognized human rights.

52. The second panellist also expressed support for extending the scope of application to all internationally recognized human rights, reflecting their universality, indivisibility and interdependence. The panellist questioned restricting the elements to acts of a transnational character since, from the victim's perspective, it was irrelevant whether an act was national or transnational. Additionally, she suggested that the instrument apply to regional organizations beyond economic integration organizations.

53. The third panellist emphasized that the working group was acting under a Council mandate; thus, human rights must prevail, not investment and trade, and urged more focus on human rights defenders. The panellist noted that a legally binding instrument should address gaps in voluntary initiatives and explore direct obligations on business.

54. With respect to the rights covered by a binding instrument, most delegations agreed that all internationally recognized human rights should be included. Some delegations mentioned specific rights, such as the right to development, the right to property and the right to permanent sovereignty over natural resources. It was suggested that the instrument should also ensure protection of nationally recognized rights. Another delegation suggested that the wording of that provision in the elements document was overbroad by including

"other intergovernmental instruments" beyond human rights treaties, since those instruments were neither binding nor universal.

55. Other delegations disagreed that all human rights should be included due to the lack of universality of many human rights.

56. Regarding the provision covering acts subjected to the instrument's application, some delegations and NGOs were concerned that its scope was unclear and suggested that the phrase "business activity that has a transnational character" be defined to ensure effectiveness of the instrument. It was noted that if liability was involved, defining the phrase was mandatory. While a delegation and panellist disagreed, it was suggested that guidance could be drawn from international instruments covering transnational crime, without borrowing definitions.

57. A regional organization indicated that, in addition to the lack of definition, there were several questions as to whether that provision was aimed at the establishment of causation, a contribution to an abuse or a linkage. They also noted the unclear language, such as "indirectly controlled".

58. A regional organization raised questions relating to the acts to be covered by a future instrument, including whether the provision discriminated between foreign and national companies if national companies were categorically excluded from the scope. In response, a panellist disagreed that that would constitute discrimination since the provision focused on conduct, not nationality. Another delegation recalled that when it came to national enterprises, they were covered by national legislation, but the same did not apply to transnational corporations, justifying the need to address such corporations. The main issue regarded human rights abuses resulting from transnational corporate activity, access to justice for victims and proper reparation. That was meant to protect human rights, and drawing a distinction was not discrimination as it was clearly recognized in several countries. According to that delegation, challenges existed in all type of companies, but the growing size of value chains had resulted in the failure to respect human rights and a lack of accountability. Therefore, a more effective reference could be linked to corporate activity rather than to the company itself.

59. Concerning which actors should be subject to the instrument, some argued that only States would be the proper subjects. Another delegation was open to the provision covering organizations of regional economic integration but questioned why those were not mentioned elsewhere in the document. Furthermore, there was concern that those organizations would be difficult to regulate in practice given the relationship between individual States and such institutions.

60. Several delegations considered that transnational corporations and other business enterprises should be subject to the instrument but not national companies. One delegation suggested that the focus should be on business activity in general, regardless of its transnational nature. Other delegations noted that such companies were subject to national laws and need not be included; in that regard, they emphasized that negotiations must go on guided by the mandate of resolution 26/9. One regional organization pointed out that the national laws of the countries they operated in regulated transnational corporations. It was highlighted that national enterprises should be included as they could also be responsible for human rights abuses. There was a call for the inclusion of online corporations in the scope of application. Several delegations emphasized that the discussions about the scope should continue within the mandate of resolution 26/9.

61. Some delegations voiced concern over the provision subjecting natural persons to the instrument, noting that was unnecessary since international criminal law covered individuals. Other delegations were of the opinion that individuals should be subject to the instrument. An NGO emphasized the importance of tackling the question of the definition

of transnational corporations, in order to avoid confusion and loopholes that transnational corporations could use to their advantage.

62. Some delegations emphasized the importance of including regulations of business activities in conflict and post-conflict areas as businesses could exploit those situations for natural resources.

C. Panel III. General obligations

63. The first panellist called for the treaty to clarify that States must regulate the extraterritorial actions of companies domiciled within their jurisdiction, for instance by ensuring that companies disclosed information about their transnational operations. With respect to international organizations, the panellist noted that those organizations had a duty to respect human rights and States must ensure that those organizations complied.

64. The second panellist did not support the content of the elements document and voiced concern about imposing international law obligations on companies, as that could lead to States delegating their duties to the private sector, undermining the full protection of human rights. Furthermore, generally imposing such duties was impractical given the number and diversity of the actors involved.

65. The third panellist decided to focus his remarks on gaps in the elements document. With respect to the obligations of States, he regretted that concepts of corporate law, such as separate legal personality, were absent, noting that a successful instrument must address those issues. Furthermore, he suggested that the instrument should clarify what constituted an actionable violation if placing binding obligations on corporations.

66. The fourth panellist emphasized workers' support of the working group and noted that labour rights must be included. She noted that the instrument should oblige companies to exercise due diligence and provide remedies. While acknowledging that some provisions in the elements document were vague, more detail could be developed during the negotiation process.

67. While many delegations supported the proposed elements under "general obligations", some noted the need to continue with negotiations on certain specific provisions, as provisions of a legally binding instrument must be worded clearly if legal consequences would attach.

68. Regarding the provisions on "State obligations", it was noted that many elements seemed to restate existing obligations and their added value was questioned. There was concern that the provisions requiring States to adapt national legislation and impose restrictions on public procurement contracts interfered with the internal affairs of States, as it should be up to each State to determine how to implement its treaty obligations. Additionally, there were calls for more specificity in the provisions regarding reporting and disclosure requirements, as well as the provision requiring States to ensure that human rights be considered in their contractual engagements.

69. Other delegations commended the drafting of the section, specifically voicing support for the recognition that States had the primary duty to protect human rights and take measures to prevent, investigate, punish and redress violations to ensure that companies respected human rights throughout their activities. Some welcomed the provision requiring States to ensure that companies conducted human rights and environmental impact assessments. However, one delegation expressed that it was beyond the working group's mandate to discuss environmental impact assessments.

70. Throughout the discussion, there were several suggestions for additional elements, including a reference to international cooperation and mutual legal assistance, clarification as to extraterritorial obligations, regulation of State-owned companies, mandatory gender

impact assessments by an independent entity, reference to conflict areas and the protection of human rights defenders, as well as gender-specific provisions that took into account the particular needs of women human rights defenders.

71. Concerning the inclusion of a section on "obligations of transnational corporations and other business enterprises", some delegations asked for information on the legal basis for imposing international human rights obligations on companies. Additionally, questions were raised as to how that would work in practice and whether that would be appropriate in the absence of a structure capable of law enforcement. Other delegations found it appropriate to impose international obligations on companies and referenced several treaties establishing obligations on legal entities. In their view, such obligations were necessary to ensure the effectiveness of the instrument.

72. Delegations suggested that additional obligations should be imposed on companies, including to mandate human rights due diligence and reporting; ensure free, prior and informed consent when operations could adversely affect communities; prevent corporate capture; oblige companies to pay taxes in countries they operated in; and positively promote human rights. An NGO highlighted the importance of establishing a general obligation on transnational corporations and other associated actors, such as financial institutions, to disclose the object and volume of their transactions, and to prohibit channelling their operations through tax havens.

73. With respect to the section on obligations of international organizations, it was questioned whether that provision belonged elsewhere since it appeared to concern an obligation of States and not international organizations as such. To the extent that the provision did create obligations for international organizations, some delegations expressed their reservation in making limitations on bodies created by different instruments with different mandates.

D. Panel IV. Preventive measures

74. The first panellist noted an existing accountability gap for victims and argued that the instrument should oblige States to require effective and binding due diligence processes from all companies covering the complete life cycle of a product, including its disposal. He noted that several provisions in the section on preventive measures did not seem directly relevant to prevention and suggested moving them to a more appropriate section.

75. The second panellist argued that preventive measures in the treaty should focus on two components: (a) preventing acts by transnational corporations that adversely affected human rights, and (b) preventing corporate capture. Regarding corporate capture, the panellist proposed that States should ensure transparency and disclosure of documents and contracts with transnational corporations. Additionally, States should prohibit political contributions from transnational corporations and forbid outsourcing of security services to companies.

76. The third panellist recommended ways to strengthen that section, such as by including references to due diligence obligations relating to development institutions, the use of independent impact assessments, the coverage of labour and environmental rights, the inclusion of a gender perspective, the use of ex ante and ex post impact assessments, and the inclusion of the free, prior and informed consent principle.

77. Delegations and NGOs highlighted the importance of prevention and welcomed a dedicated section in the document. It was questioned whether, conceptually speaking, the elements in that section should be linked with the one on obligations as the provisions addressed the obligations of States and companies. Some sought more precision in the wording of the provisions, wanting to know whether the terms "adequate" or "necessary measures" took proper account of differing capacities among States. One business

organization expressed concern that the language used reopened an issue that had been resolved in the Guiding Principles, potentially causing confusion and unintended consequences.

78. Many delegations welcomed the provision whereby States required companies to adopt and implement due diligence policies and processes. It was suggested that that provision should ensure that States implement uniform, minimum standards. A delegation and several NGOs thought risk assessments under that provision should address environmental impacts. Concern was expressed that, since those measures were to apply to all the transnational corporations and other business enterprises in a State's territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain, it would allow States to exercise extraterritorial jurisdiction improperly. The Chair-Rapporteur clarified that the due diligence obligation was meant for the parent company domiciled in a State and that a company was to assess risks throughout its supply chain.

79. Concern was expressed about the provision requiring consultation processes, as one delegation was unsure when that would be required and for what purpose. Other delegations and several NGOs saw value in the provision. Some NGOs suggested that that provision should clearly require the free, prior and informed consent of communities, in particular indigenous communities, when transnational corporation projects threatened adverse human rights impacts.

80. Concerning the provision requiring dissemination of the instrument to everyone in a State's territory in a language they could understand, some delegations stressed the importance of the populace knowing their rights; however, one delegation felt that that provision interfered with States' right to determine how to implement the instrument.

81. Some sought clarification on the provisions requiring periodic reporting, with one NGO indicating that that provision would have no teeth without an enforcement mechanism.

82. Some delegations and NGOs suggested adding language in that section aimed at preventing the capture of public institutions by vested business interests, and drew attention to article 5 (3) of the World Health Organization Framework Convention on Tobacco Control for guidance. Additionally, there was a call for the section to include enhanced due diligence for businesses operating in the context of armed conflict.

E. Panel V. Legal liability

83. The first panellist emphasized that the instrument should cover environmental, health and safety, and workers' rights, as well as corporate complicity in State violations. Given the difficulties with enforcing criminal liability, the focus should be on civil liability for multinational parent companies. Several practical challenges arose in the civil context, such as victims' lack of access to information and legal assistance, and those should be addressed to ensure that victims obtained redress.

84. The second panellist noted the comprehensive nature of the provisions on legal liability and recognized how they could be relevant in a variety of legal systems. The panellist described increasing recognition at the international and regional levels of criminal liability of legal entities. He stressed the necessity of criminal liability to serve as a deterrent, better protect individuals and communities' rights, and provide access to justice for victims.

85. The third panellist appreciated the inclusion of that section, particularly the provision ensuring that civil liability not be made contingent upon a finding of criminal liability. He cautioned against including provisions that mandated specific legal actions, as that could be contrary to certain legal systems and counterproductive to the goals of the

instrument. He further suggested that the provision discussing due diligence procedures should be placed in a different section.

86. Delegations signalled their approval for including a section on legal liability, although some suggested that that section should be clearer and more concise. Some recognized legal liability could also encompass natural persons. Most delegations and NGOs agreed that criminal, civil and administrative liability should attach to legal entities, and some delegations shared national laws that imposed those types of liability on companies. It was noted that the different types of liability were complementary; however, some delegations were concerned at the lack of differentiation among them. In their view, differentiated language was needed to reflect whether a provision referred to criminal, civil or administrative liability. Furthermore, it was noted that some legal systems did not allow for the imposition of criminal liability on legal entities; thus, provisions requiring such liability would be inappropriate. States should have the flexibility to choose how best to incorporate the treaty into national law. Concerns were also raised about the appropriateness of imposing international obligations on legal entities.

87. Some delegations called for greater detail and clear, minimum standards regarding the measures States must take to establish the different forms of legal liability in their jurisdictions. Others appreciated the flexibility provided for in the elements, allowing States to adopt their own legal measures in accordance with their national systems.

88. It was noted that the two provisions dealing with the commission and attempt of criminal offences were unnecessary given the general provision in the section covering civil, criminal and administrative offences. It was also questioned why the term "international applicable human rights instruments" was used in those sections when other sections used different terminology.

89. Clarification was sought as to the meaning of the provision establishing civil liability for companies for participating in the planning, preparation, direction of or benefit from human rights violations caused by other companies, with one delegation suggesting that that should cover indirect benefits as well. Similarly, some delegations called for more precision as to the contours of the provisions dealing with immunities, State responsibility for the actions of companies under their control, and complicity. Regarding the issue of complicity, it was queried whether States would automatically become responsible for any harm committed by a company.

90. One delegation also considered that the provision promoting decent work in supply chains fell outside the scope of the mandate given by resolution 26/9.

91. It was suggested that that language should be added to the section to address parent company liability. Additionally, an NGO suggested that international crimes should be included in the section.

F. Panel VI. Access to justice, effective remedy and guarantees of non-repetition

92. The first panellist noted that a binding instrument must build on and complement existing international standards, such as the Guiding Principles. The remedy process should be sensitive to the experiences of different groups of rights-holders, requiring consideration of the gender dimension and preventing victimization of rights-holders and human rights defenders seeking remedies. Furthermore, rights-holders must be able to seek, obtain and enforce different types of remedies.

93. The second panellist suggested strengthening the provision on legal aid by establishing an online resource that would provide information to victims, such as the relevant law and the applicable burden of proof, and would link victims to NGOs and legal

aid. Additionally, the panellist noted the importance of recognition and enforcement of judgments.

94. The third panellist discussed how important it would be for victims to have access to courts in the home States of transnational corporations. To better confront problems such as piercing the corporate veil, he recommended reversing the burden of proof and improving victims' access to disclosure. He also suggested that damages should be based on home State calculations, the abolishment of the "loser pays" principle, and inclusion of proper cost-recovery mechanisms to encourage legal representation.

95. Delegations and NGOs welcomed the inclusion of that section in the document, noting that it was crucial to address gaps in legal protection and that doing so would constitute important added value in a future instrument. In particular, efforts to remove practical and legal barriers to effective access to justice were appreciated; however, some NGOs warned that by listing specific barriers, it could be excluding those not mentioned. It was suggested that the section should clearly state the right of everyone to have access to remedy regardless of the perpetrator.

96. A regional organization indicated that the assessment in the chapeau seemed acceptable but questioned whether the provisions mostly restated existing obligations. Another delegation suggested the complete removal of the section, arguing that a more holistic approach was warranted and that the current approach would force States to adopt a system that could be inappropriate in local circumstances. A business organization noted that the root problem regarding access to justice was a lack of the rule of law, and the instrument would need to find ways of incentivizing States to implement existing obligations.

97. States and many NGOs appreciated the inclusion of a provision emphasizing the need for access to justice for vulnerable groups; however, it was suggested that more empowering and positive language should be employed. Some NGOs recommended the inclusion of language about the need for gender-sensitive access to justice and remedies. An NGO also suggested that language from the United Nations Declaration on the Rights of Indigenous Peoples should be included, in particular to recognize the different legal systems and customs of certain communities. One delegation was concerned that specific groups were being recognized at all, indicating that there would be unfair and special treatment for those listed. A panellist disagreed, arguing that fairness dictated that different groups be treated differently.

98. Clarification was requested regarding the provision concerning non-judicial mechanisms not being a substitute for judicial mechanisms. It was mentioned that recourse to non-judicial mechanisms could be in the interest of victims, as they were sometimes faster and more appropriate. One panellist agreed that non-judicial mechanisms had a role to play, but argued that they were complementary, noting that judicial mechanisms should always be available.

99. Several NGOs appreciated the provision on reducing regulatory, procedural and financial obstacles in access to remedy, in particular mentioning the importance of ensuring class actions, access to information and limiting *forum non conveniens*. Many welcomed the inclusion of a provision concerning the reversal of the burden of proof; however, one business organization argued that that provision would upset the fair balance among the parties and potentially violate due process. Panellists disagreed, noting that, in some cases, raising a displaceable presumption would be appropriate, and that reversing the burden of proof existed in some national systems.

100. Several delegations and NGOs welcomed a provision addressing the need to guarantee the security of victims, witnesses and human rights defenders, although it was questioned whether the provision went beyond what States were already obliged to do.

NGOs thought the provision could be stronger by prohibiting interference with human rights defenders, and giving defenders a legal claim if they experienced retaliation.

101. States and NGOs also expressed support for a number of other provisions, including on the different forms of remedy, the right to equality of arms and legal aid, and access to information relevant to substantiating claims.

102. Multiple NGOs suggested that a provision addressing piercing of the corporate veil should be explicitly included in the section.

G. Panel VII. Jurisdiction

103. While the first panellist welcomed the inclusion of a section on jurisdiction, she noted that a number of key concepts related to State obligations still needed clarification. She stressed that international law already allowed the exercise of prescriptive jurisdiction extraterritorially, and careful language should be employed to avoid a restrictive interpretation. In her view, enforcement jurisdiction should be given careful attention and should be addressed in the section on international cooperation.

104. The second panellist expressed serious caution with regard to the broad approach to the concept of jurisdiction adopted in the elements document and warned that asserting extraterritorial jurisdiction over entities with a tenuous connection to the forum State could raise issues related to the principles of international comity and exhaustion of local remedies. He noted that enforcement of existing legislation remained an issue and attention should be focused on strengthening incentives to enforce those laws.

105. The third panellist argued that States should address accountability gaps related to transnational corporations by recognizing jurisdiction over national companies whose activities had an impact abroad, and the instrument should clearly indicate when a cause of action arose in the home State. Additionally, barriers to accessing justice should be removed, in particular the doctrine of *forum non conveniens* since it was often used as a delaying and obstructive tactic.

106. Delegations and NGOs agreed on the importance of having a section on jurisdiction in the elements document as many transnational corporations and other business enterprises escaped liability through jurisdictional challenges. The section was considered essential to address accountability gaps, clarify when courts could consider claims for abuses occurring abroad and enhance victims' access to justice. Given the importance of that section, some delegations emphasized the need for clarity. While many found that the elements formed a good starting point, calls were made for more precision in the provisions. For instance, some questioned the contours of the definition of "under the jurisdiction" in the chapeau, asking for clarity as to the meaning of "substantial activities in the State concerned" and the extent of control needed by parent companies. Some NGOs called for coherence among the concepts in that section and references to "territory and/or jurisdiction" elsewhere in the document, as well as the reaffirmation in the "purpose" section that State obligations did not stop at their territorial borders.

107. Most of the discussion centred on whether the language should permit extraterritorial jurisdiction and the extent of that jurisdiction. Several delegations and NGOs found it crucial that the instrument permit courts to consider claims arising out of activities abroad. Those delegations indicated that the use of extraterritorial jurisdiction had been approved by a range of judicial bodies and instruments, including national court cases, treaties and other international instruments. Other delegations suggested that clear references to the bases for jurisdiction should be included. In their view, under international law, extraterritorial jurisdiction could only be invoked exceptionally, duly justified by a legitimate interest and when a real and substantial link existed between a forum and the parties and claims concerned. That could be based on prescriptive jurisdiction principles,

such as nationality, passive personality and the protective principle. Going beyond traditional bases of jurisdiction could raise several issues. For instance, too much reliance on home State jurisdiction could act as a disincentive for host States in ensuring access to justice. Additionally, an expansive view of jurisdiction had the potential to violate the territorial integrity and sovereign equality of States, principles which were reaffirmed in the preamble of the elements document. However, panellists considered that those risks were overstated as that section did not authorize extraterritorial enforcement jurisdiction, and risks associated with such jurisdiction were allayed with the inclusion of a section on international cooperation.

108. With respect to specific provisions, delegations expressed most concern with the provision authorizing jurisdiction over subsidiaries throughout the supply chain domiciled outside States' jurisdiction. Additionally, concern was raised about the provision permitting jurisdiction over abuses alleged to have been committed by transnational corporations and other business enterprises throughout their activities, including their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them. They argued that that wording was too broad and could cover legal entities with little connection to the forum State.

109. Clarification was sought as to the provision permitting claims by victims within a State's jurisdiction. It was queried whether that referred to nationals, residents or something else.

110. Additionally, it was proposed that certain provisions be added to that section. Some delegations and NGOs suggested explicitly prohibiting the use of *forum non conveniens*. Another delegation and NGO recommended adding a provision to address the conflict of laws. Calls were made to address conflict situations, as local courts were often unavailable in situations of armed conflict. One delegation suggested that jurisdiction over online enterprises be addressed. Furthermore, it was proposed that universal jurisdiction be established for conduct constituting international crimes.

H. Panel VIII. International cooperation

111. The first panellist noted the importance of that section given our globalized, fragmented economy. He suggested two ways to strengthen that section. First, by including subsections addressing cooperation in investigative, prosecutorial, administrative systems, and criminal and civil court systems separately. Second, by establishing a public register to help with the coordination of research.

112. The second panellist discussed how cooperation should generally address treaty implementation, helping States with national implementation and enforcement of judgments. To ensure appropriate cooperation, States should (a) ensure access to information for investigatory functions, (b) adopt rules to ensure mutual judicial cooperation, (c) ensure adequate standards of due process, (d) consider reflecting the principle of comity in the instrument, and (e) draw inspiration from existing instruments and standards.

113. Many delegations and NGOs agreed on the importance of international cooperation. One of the main obstacles to effective regulation of transnational corporations was the fact that they operated in multiple jurisdictions; thus, cooperation between States was necessary to ensure abuses were properly addressed. NGOs shared cases in which victims were unable to obtain redress due to a lack of international cooperation. Major obstacles to justice for those victims, such as difficulties in obtaining information, could be rectified with proper cooperation among States. Thus, it was important for States to agree on certain standards to ensure efficient investigation, prosecution and enforcement. Some delegations referred to other processes and instruments for guidance, such as the United Nations

Convention against Transnational Organized Crime and the United Nations Convention against Corruption. One delegation also said that regulating the recognition and enforcement of foreign judgments under the treaty should not overlap with the work being undertaken at the Hague Conference on Private International Law.

114. One delegation and a business organization argued that international cooperation should be developed generally and not focus on the specific regime. There was a fear that developing new obligations on international cooperation could conflict with other processes or send contradictory messages as to United Nations standards and its broader activities. Instead, States should focus on strengthening existing international cooperation mechanisms and continue to develop national action plans. Another delegation stressed that enhancing international cooperation could also benefit businesses. Furthermore, efforts should be taken to increase peer pressure among States to strengthen implementation of the Guiding Principles.

115. A regional organization stressed its advocacy for increased mutual legal assistance, including for cross-border investigation. It noted that the provisions under that chapter were interesting; however, it mentioned that already much was being done, for instance the work of the OHCHR accountability and remedy project on cross-border cooperation. It also questioned how the provisions in that section would allow for implementation given the current constraints, such as the lack of resources of prosecutors' offices to investigate cases involving transnational corporations and other business enterprises. Some delegations and a panellist suggested that provisions on technical assistance could be included to address some of those challenges.

116. Delegations called for greater specificity in the provisions of that section, taking into account that different levels of cooperation were required. There were multiple suggestions to differentiate the section based on whether cooperation was needed for civil, criminal or administrative matters, and to include more precise provisions on the means of cooperation needed for these different types of regimes. Additionally, there were calls for more detail into what processes should be required, in particular for evidence collection and sharing, and reciprocal recognition of civil judgments. It was also noted that a provision should be included to ensure reciprocity among States.

I. Panel IX. Mechanisms for promotion, implementation and monitoring

117. The first panellist suggested that drafters focus on four principles in that section. First, accountability, lessons on which could be drawn from processes regulating business conduct outside of the human rights context, such as the World Bank Inspection Panel. Second, transparency, given the importance of access to information. Third, participation, although caution should be exercised regarding abuse by the private sector. Fourth, cooperation, which should be ensured at the national, regional and international levels.

118. The second panellist discussed cases in which victims were unable to access justice through existing institutions. She argued for the creation of an international court for affected individuals and communities to hold transnational corporations accountable. While supportive of the creation of an ombudsman, as proposed in the elements, she claimed that that would not be an adequate substitute for an international judicial body.

119. The third panellist welcomed that section in the elements document and noted that international mechanisms were needed. Implementation lay foremost with national jurisdictions, but a complementary, properly resourced international court should exist when national jurisdictions fail. The treaty body proposed in the elements would also be welcome and should be endowed with the ability to make recommendations, as well as referrals to the international court.

120. Several delegations and NGOs welcomed the inclusion of that section and the creation of mechanisms to promote, implement and monitor a future instrument. Many called for the ability of victims to directly access those mechanisms, and an additional provision to protect against retaliation by those who engaged those mechanisms was mentioned. Some argued that, without enforcement mechanisms, the instrument would not be properly implemented. Other delegations questioned the usefulness of creating a new mechanism, arguing that the focus should be on strengthening existing institutions. One delegation reiterated that States had the prerogative to decide on how to enforce its treaty commitments. It was also noted that there should be more reliance on national action plans in order to bring the treaty to the national level. One delegation asked how the instrument could strengthen non-judicial mechanisms and what the role of national human rights institutions could be in that regard.

121. Several delegations approved of the establishment of an international judicial mechanism to hear complaints regarding violations by transnational corporations, including through the establishment of special chambers in already existing regional courts, noting that victims and certain States had been calling for the creation of such institutions for some time. However, questions were raised as to whether an international court could be effective or delay negotiations for years, and there were concerns regarding budgetary and political issues involved with establishing a court. A question was asked whether that referred to past deliberations over the International Criminal Court, whether it was an appeal to broaden the jurisdiction of the Court and whether the proposal was feasible.

122. Delegations expressed support for the creation of an international committee to monitor the treaty, and it was noted that the creation of a committee would not preclude the creation of other institutions or the involvement of national human rights institutions and ombudspersons. Some delegations approved of the proposed functions of that committee in the elements, including examining periodical reports and individual and collective communications. It was suggested that that body should consider victims as its centre of attention, and that it could foster international cooperation, technical assistance and share best practices. An expectation for a draft text of the treaty by the Chair-Rapporteur in the next session was highlighted.

123. Additionally, some delegations proposed the establishment of a non-judicial, peer review mechanism, and some NGOs suggested creating a monitoring centre that could be jointly run by States and civil society.

J. Panel X. General provisions

124. One NGO welcomed a provision in the section on general provisions regarding the primacy of a future instrument over other obligations from trade and investment legal regimes. It also stressed the importance of allowing for the participation of civil society and affected communities.

K. Panel. Victims' voices

125. Five panellists provided introductory remarks, commenting on a range of issues, including violations of indigenous peoples' rights, abusive practices in drug patenting and pricing, harm caused by agricultural projects, impunity relating to toxic pollution, development projects displacing communities and the role of international financial institutions in supporting harmful practices.

126. The panellists' presentations were followed by interventions from delegations and NGOs, highlighting specific cases of abuse and State failure to implement existing human rights obligations. Some delegations defended the adoption of a balanced, victim-centred

document. It was highlighted that States should participate in that process and not stop codifying just because existing treaties were not implemented. There was a call for strengthening existing institutions and implementation of existing instruments, such as the Guiding Principles; guidance in that regard could be drawn from initiatives such as the OHCHR accountability and remedy project. Others expressed the view that existing institutions and instruments were failing to ensure the protection of victims, and that the creation of a legally binding instrument to oblige States and transnational corporations and other business enterprises to comply with human rights standards, and the creation of mechanisms to enforce such obligations, were necessary to address shortcomings in the current system. Delegations and NGOs stressed the importance of victims' participation in those processes, the need to ensure that they obtained redress when their rights were violated, and the importance of protecting human rights defenders. One regional organization stated that those who had suffered human rights violations by States, as well as those that were victims of abuses by non-State actors, had a right to access justice and a right to effective remedy, and insisted that States must implement existing obligations.

V. Recommendations of the Chair-Rapporteur and conclusions of the working group

A. Recommendations of the Chair-Rapporteur

127. **Following the discussions held during the first three sessions of the working group, in particular the discussion on the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights presented by the Chair-Rapporteur, and pursuant to its mandate, as defined in paragraph 1 of resolution 26/9, and acknowledging the different views expressed, the Chair-Rapporteur should:**

(a) **Invite States and different stakeholders to submit their comments and proposals on the draft elements document no later than the end of February 2018;**

(b) **Present a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, on the basis of the contributions from States and other relevant stakeholders, at least four months before the fourth session of the Working Group, for substantive negotiations during its fourth and upcoming annual sessions until the fulfilment of its mandate;**

(c) **Convene a fourth session of the Working Group to be held in 2018 and undertake informal consultations with States and other relevant stakeholders on its programme of work.**

B. Conclusions of the working group

128. **At the final meeting of its third session, on 27 October 2017, the working group adopted the following conclusions, in accordance with its mandate established by resolution 26/9. The Working Group:**

(a) **Welcomed the opening messages of the United Nations High Commissioner for Human Rights and of the President of the Human Rights Council and thanked the Minister for Foreign Affairs of Ecuador, Maria Fernanda Espinosa Garcés, and the Member of the French National Assembly, Dominique Potier, for their participation as keynote speakers. It also thanked the independent experts and representatives who had taken part in panel discussions, the interventions, proposals and comments received from Governments, regional and political groups,**

intergovernmental organizations, civil society, NGOs and all other relevant stakeholders, which had contributed to the substantive discussions of the session;

(b) Took note of the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, prepared by the Chair-Rapporteur in accordance with paragraph 3 of resolution 26/9 and the substantive discussions and negotiations and the presentation of various views thereof;

(c) Requested the Chair-Rapporteur to undertake informal consultations with States and other relevant stakeholders on the way forward on the elaboration of a legally binding instrument pursuant to the mandate of resolution 26/9.

VI. Adoption of the report

129. **At its 10th meeting, on 27 October 2017, after an exchange of different views on the report and some of its elements, the working group adopted *ad referendum* the draft report on its third session and decided to entrust the Chair-Rapporteur with its finalization and submission to the Council for consideration at its thirty-seventh session.**

Annex I

List of participants

States Members of the United Nations

Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Burundi, Central African Republic, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czechia, Democratic Republic of the Congo, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Côte d'Ivoire, Jamaica, Jordan, Kazakhstan, Kenya, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mauritania, Mexico, Monaco, Morocco, Mozambique, Myanmar, Namibia, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sudan, Sweden, Syrian Arab Republic, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela (Bolivarian Republic of), Zambia.

Non-member States represented by an observer

Holy See, State of Palestine.

United Nations funds, programmes, specialized agencies and related organizations

United Nations Conference on Trade and Development.

Intergovernmental organizations

European Union, International Chamber of Commerce, International Development Law Organization, Organisation of Islamic Cooperation, South Centre.

Special procedures of the Human Rights Council

Working Group on the issue of human rights and transnational corporations and other business enterprises, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Independent Expert on the promotion of a democratic and equitable international order.

National human rights institutions

The National Human Rights Council of Morocco, German Institute for Human Rights, Danish Institute for Human Rights.

Non-governmental organizations in consultative status with the Economic and Social Council

Academic Council on the United Nations System; Al-Haq: Law in the Service of Man; American Bar Association; Amnesty International; Asia Pacific Forum on Women, Law

and Development (APWLD); Association for Women's Rights in Development (AWID); Centre Europe — Tiers Monde — Europe-Third World Centre (CETIM); Center for International Environmental Law (CIEL); Comité Catholique contre la Faim et pour le Développement (CCFD); Conectas Direitos Humanos; Coopération Internationale pour le Développement et la Solidarité (CIDSE); Corporate Accountability International (CAI); Fondation pour l'étude des relations internationales et du développement; FIAN International e.V.; Franciscans International; Friends of the Earth International; Geneva Infant Feeding Association; Global Policy Forum; Indian Movement "Tupaj Amaru;" Indigenous Peoples' International Centre for Policy Research and Education (Tebtebba); Institute for Policy Studies (IPS); Instituto Para la Participación y el Desarrollo-INPADE-Asociación Civil; International Association of Democratic Lawyers (IADL); International Commission of Jurists; International Federation for Human Rights Leagues (FIDH); International Institute of Sustainable Development; International Organisation of Employers (IOE); International Service for Human Rights (ISHR); International Trade Union Confederation; IT for Change; iuventum e.V.; Legal Resources Centre; Oxfam International; Public Services International (PSI); Réseau International des Droits Humains (RIDH); Sikh Human Rights Group; Social Service Agency of the Protestant Church in Germany; Society for International Development; Stichting Global Forest Coalition; Swiss Catholic Lenten Fund; Tides Center; Verein Sudwind Entwicklungspolitik; Women's International League for Peace and Freedom (WILPF).

Annex II

List of panellists and moderators

Monday, 23 October 2017

Keynote speakers

- H.E. María Fernanda Espinosa, Minister of Foreign Affairs of Ecuador, and former Chairperson-Rapporteur of the open-ended intergovernmental working group
- Dominique Potier, Member of the French National Assembly

Subject I — General framework (15:00–18:00)

- Lola Sánchez, Member of the European Parliament
- Richard Kozul-Wright, Director of the Division of Globalization and Development Strategies, UNCTAD
- Vicente Yu, Deputy Executive Director, South Centre

Tuesday, 24 October 2017

Subject II — Scope of application (10h00–13h00)

- Kinda Mohamedieh, South Centre
- Sigrun Skogli, Professor, University of Lancaster
- Manoela Roland, Professor, Universidade Federale de Juiz de Fora

Subject III — General obligations (15h00–18h00)

- Olivier De Schutter, Professor, Université de Louvain
- Linda Kromjong, Secretary-General of the International Organization of Employers
- David Bilchitz, Professor, University of Johannesburg and Director, South African Institute of Advances Constitutional, Public, Human Rights and International Law
- Makbule Sahan, representative of the International Trade Union Confederation

Wednesday, 25 October 2017

Subject IV — Preventive measures (10h00–13h00)

- Baskut Tuncak, UN Special Rapporteur on hazardous substances and wastes
- Iván González, representative of the Confederación Sindical de Trabajadores de las Américas, CSA
- Ana María Suárez-Franco, FIAN International

Subject V — Legal liability (10h00–13h00)

- Richard Meeran, Partner, Leigh Day & Co.
- Carlos López, International Commission of Jurists
- Humberto Cantú Rivera, Professor, University of Monterrey

Subject VI — Access to justice, effective remedy and guarantees of non-repetition (15h00–18h00)

- Surya Deva, Chairperson of the United Nations Working Group on Business and Human Rights
- Gilles Lhuilier, Professor, Ecole Normale Supérieure (ENS) Rennes, France
- Richard Meeran, Partner, Leigh Day & Co.

Thursday, 26 October 2017

Subject VII — Jurisdiction (10h00–13h00)

- Sandra Epal Ratjen, International Advocacy Director, Franciscans International
- Lavanga Wijekoon, Littler Mendelson
- Gabriela Quijano, Amnesty International

Subject VIII — International cooperation (10h00–13h00)

- Harris Gleckman, Center for Governance and Sustainability, University of Massachusetts, Boston
- Vicente Yu, Deputy Executive Director, South Centre

Subject IX — Mechanisms for promotion, implementation and monitoring (15h00–18h00)

- Baskut Tuncak, UN Special Rapporteur on hazardous substances and wastes
- Anne van Schaik, Friends of the Earth Europe
- Melik Özden, CETIM

Subject X — General provisions (15h00–18h00)

Friday, 27 October 2017

Panel — The voices of the victims (selected cases from different sectors and regions) (10h00–13h00)

- Alfred de Zayas, United Nations Independent Expert on the promotion of a democratic and equitable international order
- Lorena di Giano, Red Latinoamericana por el Acceso a los Medicamentos
- Mohamed Hakech, La Via Campesina MENA region
- Maria del Carmen Figueroa, Asamblea Nacional de Afectados Nacionales
- Hemantha Withanage, Friends of the Earth — CEJ